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Public Law: Local Government

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union (or other agent) to serve as their exclusive agent for collective bargaining, it follows, as previously stated, that there will be no collective bargaining. There is one significant exception to this generalization. Collective bargaining, as previously understood and practiced, will very likely continue in those cases where the relationship affects interstate commerce because of the protection afforded by the federal act. Under the *Garner* principle the right to designate a union as the exclusive agent for collective bargaining will survive as one of the rights conferred by section 7 of the federal act. Section 14(b) of the federal act, impliedly authorizing the adoption of state right to work acts, was not intended and presumably will not be construed to permit the states to destroy the whole concept of collective bargaining. With this exception and in intrastate situations, however, collective bargaining will survive only to the extent that employers are willing to forego the use of the weapon which the court has made available to them in the *Piegts* case. Judging the future by the past it seems unlikely that we will observe many instances of such admirable self restraint.

It is to be hoped, however, that the result will be changed by either of the two avenues which suggest themselves. First, the court itself, upon reflection may conclude that it has adopted a construction of the act which was never intended by the Legislature and overrule the case. The second possibility is for the Legislature to amend the act, specifically authorizing unions to serve as the exclusive agents of employees for the purpose of collective bargaining.

LOCAL GOVERNMENT

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OFFICERS

A close and very interesting question was presented to the Supreme Court by the twin cases of *O'Keefe v. Burke*.[1] There, plaintiff judicially challenged defendant's eligibility to be declared the Democratic nominee for public office, on the ground

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1. 226 La. 1026, 78 So.2d 161 (1955); and 226 La. 1039, 78 So.2d 165 (1955). On appeal in the second case, the Supreme Court affirmed the judgment of the trial court overruling certain technical defenses of little importance, and finding on the merits that defendant had not been a resident of Louisiana for the required minimum period.

that defendant had not been an actual, bona fide resident of Louisiana for the required two-year period preceding the primary election. The prayers of the petition were that plaintiff be declared the Democratic nominee, or in the alternative that the primary election be declared null. A number of technical defenses to the suit were raised by the defendant, but only his exception to the jursidiction of the court *ratione materiae* need be considered.

The universal rule in America is that the validity of an election presents political rather than judicial questions, in the absence of an express constitutional or statutory provision granting the courts jurisdiction over the controversy. To meet this jurisprudential rule, plaintiff invoked R.S. 18:364 — a section of the Primary Election Law — providing for the judicial contest of a primary election by a candidate for the nomination for an office "who claims that but for irregularities or fraud he would have been nominated."[2] In *Hall v. Godchaux*,[3] decided before the effective date of the Louisiana Constitution of 1921, the identical provision of a former statute had been held to confer jurisdiction upon the courts to determine the eligibility of the party nominee. Defendant's exception was based upon the provisions of R.S. 18:307, a section of the Primary Election Law adopted after the decision in *Hall v. Godchaux,* requiring anyone questioning the qualifications of a candidate for the party nomination to file a written objection with the party committee, and permitting a judicial review of the ruling of the committee thereon.[4] Since no such objection had been filed, defendant invoked the ruling of the "dummy candidate" case[5] and subsequent decisions,[6] holding that no person could challenge the qualifications of a candidate for party nomination judicially except by complying with R.S. 18:307.

2. The source of this section of the Revised Statutes is La. Acts 1940, No. 46, § 85, p. 210, which is substantially identical with La. Acts 1916, No. 35, § 25, p. 83, as amended, La. Acts 1920, No. 210, § 6, p. 353 — the statutory provision construed in Hall v. Godchaux, 149 La. 733, 90 So. 145 (1921).

3. 149 La. 733, 90 So. 145 (1921).

4. The source of LA. R.S. 18:307 (1950) is La. Acts 1922, No. 97, § 11, p. 181, which was held constitutional in Reid v. Brunot, 153 La. 490, 96 So. 43 (1923), and which the various opinions in LeBlanc v. Hoffman, 175 La. 517, 143 So. 393 (1932) recognized as having been adopted to overrule legislatively Hall v. Godchaux, 149 La. 733, 90 So. 145 (1921).

5. LeBlanc v. Hoffman, 175 La. 517, 143 So. 393 (1932).

6. Farrell v. Orleans Parish Democratic Executive Committee, 15 So.2d 524 (La. App. 1943) and cases cited; Courtney v. Singleton, 27 So.2d 448 (La. App. 1946) and cases cited.

To avoid the force of this argument, plaintiff challenged the validity of R.S. 18:307 on the ground that it violated three separate sections of article VIII of the Louisiana Constitution: (1) section 4, requiring the Legislature to "enact laws to secure fairness in party primary elections"; (2) section 12, requiring the Legislature to "provide by law for the trial and determination of contested elections of all public officers, . . . which trials shall be by the courts of law"; and (3) section 13, providing that no person shall be eligible to any public office unless he is a citizen and elector of the state. If R.S. 18:307 was unconstitutional, argued the plaintiff, then under R.S. 18:364, as construed in *Hall v. Godchaux*, the courts had jurisdiction over the controversy.

The majority of the justices of the Supreme Court accepted this argument, and reversed the decision of the trial court maintaining the exception to the jurisdiction. The majority opinion is not as clear on the point as might be desired, but it sufficiently appears that the decision holds R.S. 18:307 violative of all three of the constitutional sections invoked by plaintiff. The majority of the members of the court, however, refused to recognize plaintiff as the party nominee for the office, but held the primary election null on the ground of the ineligibility of defendant. Two of the justices concurred, and two dissented.

The dissenting opinion of Justice McCaleb makes it extremely difficult for the objective reader to accept the reasoning and conclusions of the majority with respect to the question of jurisdiction. The constitutionality of the statutory source of R.S. 18:307, he points out, had been upheld in *Reid v. Brunot*,[7] where it had been challenged on the ground that it offended sections 4, 12, and 35 of article VIII of the Louisiana Constitution. Quite aptly, the dissenting justice might have pointed out that the constitutional mandate to the Legislature to "enact laws to secure fairness in party primary elections" did not sanction a judicial free-wheeling, permitting the courts to substitute their social and political predilections for legislative decisions. Perhaps more effectively, and certainly more diplomatically, he demonstrated the soundness and validity of the legislative policy vacuated by the majority by pointing out that in the future:

"[N]o candidate in a party primary is required to file his ob-

7. 153 La. 490, 96 So. 43 (1923).

jections to his opponent's asserted residential qualifications until after the primary is held. In other words, he may pursue the strategy of the contestant in this case of engaging in the primary and making the alleged lack of his opponent's residential qualifications a principal issue. Then, if rejected by the voters, he may continue his attack in the courts under the rather fatuous allegation that a fraud has been perpetrated upon the electorate."[8]

Quite obviously, the constitutional mandate to the Legislature to provide for the judicial "trial and determination of contested *elections of all public officers*" relates to general elections, rather than party primaries. The dissenting justice wasted no words in seizing upon this difference, and in pointing out that it had been so recognized expressly in *Reid v. Brunot*. The dissenting opinion contains no direct and specific answer to the contention that R.S. 18:307 violates the constitutional provision requiring every public officer to be an elector. This, however, is no hiatus, as the whole tenor of the dissenting opinion bares the vulnerability of the contention to the objective reader. The challenged statute makes ample provision for enforcing the constitutional requirement, though it throws upon the political party initially the duty of determining the qualifications of candidates for party nomination.

In the writer's opinion, these two cases are doubly unfortunate. They will throw unnecessary litigation upon the courts, and there is nothing which the Legislature can do constitutionally to remedy the situation.

In *Gervais v. New Orleans Police Department*[9] a police officer sought a reversal of the decision of the Civil Service Commission of New Orleans upholding his removal from office by the city superintendent of police. His dismissal was based on four specific acts of conduct unbecoming a police officer, the facts of which he admitted. His defense, however, was that all of the acts had been committed prior to the adoption of section 15 of article XIV, which embodied civil service into the Louisiana Constitution, and hence he was not subject to dismissal under the provisions of this constitutional amendment. Dual answers were given by the court to this argument. First, the case was differentiated from those in which the dismissal of a

8. 226 La. 1026, 1038, 78 So.2d 161, 165.
9. 226 La. 782, 77 So.2d 393 (1954).

classified employee was grounded upon acts committed prior to the adoption of the civil service law. Here, appellant had been under civil service since the adoption of act 71 of 1940, which was continued in force by the constitutional amendment except insofar as in conflict therewith. Second, the court held that the civil service constitutional amendment was not a penal provision, requiring a strict construction. But for civil service the appellant had no tenure rights, and as a public employee might otherwise be dismissed summarily. Hence, the Legislature which granted the right could at any time take it away, or change the procedure by which it could be protected or defended.

The right of a municipal fire and police civil service board to conduct a public investigation of the conduct of officers without formal charges having been preferred against them was involved in two cases.[10] These cases were precipitated by the action of the Shreveport board in notifying members of the fire and police departments that it would investigate their conduct with respect to an alleged conspiracy to coerce the city safety commissioner into failing to perform his official duties. The officers immediately sought an injunction in the district court to prohibit this investigation on the ground that it was unconstitutional and ultra vires. After a trial, the district court granted the permanent injunction as prayed for, but reserved the rights of the board to hold a public trial if and when specific complaints were made against the officers. On appeal, the intermediate appellate court reversed the judgment and rejected the officers' demands, holding the board's action sanctioned by the applicable constitutional provision. Under a writ of review, the majority of the members of the Supreme Court affirmed the judgment of the court of appeal. Express power of the board to conduct whatever investigations it might deem necessary was found in the applicable constitutional provisions. The majority found it unnecessary to determine whether the applicable provision permitted a public investigation, since they held that the requirement that all meetings of the board be public made an open investigation necessary. Justice Hamiter's dissenting opinion presents a different point of view with respect to the last point. Admitting that all meetings of the board were required to be public, the dissenting justice pointed out that the board also

10. Oliver v. Shreveport Municipal Fire and Police Civil Service Board; Bussie v. Same, 227 La. 1067, 81 So.2d 398 (1954).

acted through hearings and investigations, and that the omission of the pertinent constitutional provisions to require public hearings and investigations indicated an intention by the electors not to require them.

ELECTIONS AUTHORIZING BOND ISSUES

The liberal attitude of our Supreme Court in refusing to annul elections authorizing the issuance of bonds by local governments because of the commission of technical irregularities which are not shown to have affected the result of the elections is illustrated by two cases decided during the past term.

In *Jones v. City of Lake Charles*[11] a taxpayer sued to annul a $1,600,000 bond issue authorized by the taxpaying electors to defray one-fourth of the cost of constructing an expressway through the city. Five different irregularities were urged as invalidating the bond issue. First, it was contended that the registrar of voters failed to close the registration books thirty days before the special election. This contention was swept aside, since at best it would render illegal the registrations and votes of those who registered within the thirty-day period, and there was no evidence as to the number, identities and vote of any of these. Second, the election was claimed to be void because the polls opened at 7:00 a.m. and closed at 6:00 p.m., notwithstanding the requirement of R.S. 18:1181 — the Voting Machine Law — that the polls open and close at 6:00 a.m. and 9:00 p.m., respectively. As the statutory provision invoked applied only to primary and general elections, and the polls had been opened and closed in accordance with the statutory provision regulating special elections, the objection was overruled. Third, it was argued that the election was void since the notice of the resolution calling the election had not been published in the official journal seven days before adoption by the council, as required by R.S. 35:552. This contention was held without force, as the statutory section invoked related only to ordinances and resolutions expending money, and not to special elections. Fourth, the plaintiff attacked the sufficiency of the notice calling for the special election on the ground that it contained no information concerning the location of the expressway. This was held immaterial, as the only statutory requirement was that it indicate "the purpose for which the debt is to be incurred," and this had

11. 227 La. 794, 80 So.2d 411 (1955).

been complied with. Last, plaintiff attacked the validity of the resolution authorizing the mayor to enter into a contract with the state department of highways, and the contract made pursuant thereto. Since no issue had been raised by the pleadings as to the invalidity, and the evidence introduced to support this contention was admissible under other issues raised by the pleadings, the court refused to consider these grounds.

In *Duncan v. Vernon Parish School Board*[12] a number of technical irregularities were invoked as grounds for annulling an issue of $85,000 of bonds by a school district. The most serious of these was with respect to forty-eight of the voters participating in the election. It was alleged that no voting booths were provided for them, that they had no opportunity to prepare their ballots in secret, and that the ballots were prepared and signed for them by others. However, since there was no proof as to whether these persons voted for or against the proposition, or that their votes changed the results of the election, the court refused to hold these irregularities sufficient to invalidate the election. The other irregularities claimed, and held by the court to be insufficient to annul the election, were that the list of voters furnished by the registrar contained some errors and omissions, that the commissioners at the election were not sworn, and that the polls remained open after the hour required for closing. Sensing the inadequacy of the individual irregularities complained of, the plaintiffs relied upon an earlier decision[13] holding that, even though no fraud or collusion had been charged, where the irregularities were so gross, numerous, and flagrant as to constitute an injustice to the taxpayers, the election would be set aside. Without approving the precedent invoked, the court experienced no difficulty in differentiating the facts of the two cases.

ORDINANCES

In two cases reaching the Supreme Court during the past term, the validity of municipal ordinances were upheld. *State v. Reuther*[14] raised the issue as to the legality of an ordinance of New Orleans creating the Special Citizens Investigating Committee, and authorizing it to investigate the affairs of the police department, to subpoena witnesses, and to administer oaths. The

12. 226 La. 379, 76 So.2d 403 (1954).
13. F. B. Williams Cypress Co. v. Police Jury of St. Martin Parish, 129 La. 267, 55 So. 878 (1911).
14. 227 La. 1037, 81 So.2d 387 (1955).

state appealed from a ruling of the district court quashing an indictment of the defendant for perjury, it having been alleged that he testified falsely before, and under an oath administered by, the investigating committee. The basis of the motion to quash the indictment was the argument that the Commission Council had no authority to delegate to the investigating committee the power to administer oaths. Short shrift was made of this contention by the Supreme Court, which reversed the ruling appealed from. Under section 22 of article XIV of the Louisiana Constitution — the Home Rule Charter of New Orleans — that city was granted all of the powers, privileges, and functions which had been or could be granted by the Legislature to any municipality. This plenary grant of constitutional power was held amply sufficient to permit the Commission Council to delegate to the Investigating Committee the authority to administer oaths.

In *Wharton v. City of Alexandria*[15] the plaintiff property owners sought to enjoin the defendant city from paving a lane which they alleged never had been dedicated as a public road or street, and which belonged to them. In the alternative, plaintiffs prayed that the city be enjoined from including in the paving contract the costs of subsurface drainage in connection therewith, which under the ordinance would be passed on to the abutting property owners. On the primary demand, both the trial and the appellate courts found that the property had been dedicated as a public road prior to the incorporation of the property into the municipal limits. Likewise, both courts rejected plaintiff's alternative demand on the ground that, while the statute under authority of which the paving ordinance had been adopted did not expressly mention subsurface drainage, under the settled jurisprudence authority to pave includes authority to grade, curb, and drain.

ZONING

The quota of cases involving the validity of zoning regulations was unusually small during the past term. Actually, only one such case was decided.[16] In *New Orleans v. Leeco, Inc.*,[17]

15. 226 La. 675, 77 So.2d 1 (1954).

16. Though Archer v. Shreveport, 226 La. 867, 77 So.2d 517 (1955) does involve the validity of an amendment of a zoning ordinance, the only point presented in that case was the right of plaintiffs to appeal devolutively from an adverse judgment in the trial court.

17. 226 La. 335, 76 So.2d 387 (1954).

the city sought to enjoin defendant's use of a building as a theater on the ground that it violated the city's zoning ordinance. A preliminary injunction prohibiting the use of the building for such purpose was issued. Thereafter, a new zoning ordinance was adopted, changing the zone in which defendant's building was situated so that the use of the building as a theater was no longer prohibited. Defendant then moved to dissolve the preliminary injunction, and after a hearing the trial court granted the motion. The city then applied for supervisory writs to coerce the trial court into reinstating the preliminary injunction, and alternative writs were granted by the Supreme Court. To support its position, the city relied upon the language of the saving clause of the new ordinance, providing that no suit or prosecution resulting from a violation of a prior ordinance would be abated. In recalling its alternative writs, the Supreme Court held that this saving clause was intended to prevent the abatement of penalties incurred under former ordinances, but was not intended to preclude forever a nonconforming use under the ordinances repealed.

LOCAL GOVERNMENTAL RESPONSIBILITY IN TORT

The validity of the harsh and anachronistic rule exempting local governments from responsibility for the offenses and quasi-offenses of their employees in the performance of "governmental" functions was challenged vigorously in *Barber Laboratories v. New Orleans*.[18] The trial court maintained an exception of no cause of action to a petition alleging, in substance, that through the negligence of firemen employed by defendant city, a fire which might have been readily extinguished caused $50,000 more damages to plaintiff's property than it would have had these firemen worked efficiently. On appeal, plaintiff argued strenuously that this jurisprudential rule was neither valid nor realistic; that the trend in other American jurisdictions was towards its abandonment; and that it was completely incompatible with the principles of the civil law of Louisiana. The Supreme Court refused to reverse its prior decisions, and affirmed the judgment appealed from.[19]

18. 227 La. 104, 78 So.2d 525 (1955).

19. The plaintiff also argued that Martin v. Board of Fire Commissioners, 132 La. 188, 61 So. 197 (1913) established an exception to the general rule of immunity in cases involving a fire department. The court felt otherwise and held that the immunity rule was not raised or considered in the *Martin* case.

Though this decision will surprise no one,[20] it does serve to point up the urgent need for the adoption of a Torts Claim Act similar to the federal statute, but broad enough to subject both state and local governments to a responsibility for the tortious acts of their employees.

PUBLIC UTILITIES

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Completion of the Union Station in New Orleans would hardly have been considered the occasion for curtailing railroad service into the city when plans for it were entered upon. However, for the Gulf, Mobile and Ohio Railroad Company, which had found the operation of its passenger train service from Jackson, Tennessee, to New Orleans progressively less profitable, it provided such an opportunity.[1] Nevertheless, its rather precipitous and unauthorized initial discontinuance of train service on February 21, 1954, involved considerable maneuvering between administrative agencies and the courts, both state and federal, before its final success.

On the day before discontinuance of service into Slidell, the railroad applied to the Louisiana Public Service Commission for permission to discontinue as to the portion of the service within the state. It also notified the state Commission of its intention to discontinue service over leased trackage between Slidell and New Orleans and on March 8, 1954, actually took this step.[2] Thereafter, it applied to the Interstate Commerce Commission for a certificate of authority to so abandon.[3]

After hearing before the state Commission, it was ordered to resume service between Slidell and New Orleans until further orders on the ground that it had discontinued an intrastate operation without required prior state authority. The railroad sought unsuccessfully to enjoin that order in the federal district court. Relief was refused on the ground that under state

20. For an excellent discussion and criticism of the Louisiana decisions, see Fordham & Pegues, *Local Government Responsibility in Tort in Louisiana*, 3 LOUISIANA LAW REVIEW 720 (1941).

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1. Gulf, Mobile and Ohio R.R. v. Louisiana Public Service Commission, 226 La. 952, 77 So.2d 548 (1954).

2. *Id.* at 956, 77 So.2d at 549.

3. Appellee's Original Brief, Docket No. 41897, at 6.